

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 045425-99

Mary Conrad
McLean Hospital
Partners Healthcare System, Inc.

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy & Fabricant)

APPEARANCES

James S. Aven, Esq., for the employee
Joseph S. Buckley, Esq., for the self-insurer at hearing and on appeal
Richard W. Jensen, Esq., for the self-insurer on appeal

HORAN, J. The self-insurer appeals from a decision awarding the employee permanent and total incapacity benefits for a November 18, 1999 work-related shoulder and neck injury. The self-insurer raises one issue on appeal. It argues the employee's vocational expert, Dr. Emmanuel Green, impermissibly formed an opinion based in part upon his lay understanding of pain medication, and its side effects. Because we deem the issue waived, we affirm the decision.

The judge credited Dr. Green's testimony in support of the benefit award. She summarized his opinion as follows:

Dr. Green concluded that based on the § 11A examiner's report that the employee was unable to perform her past relevant work as a nurse. Furthermore, he concluded that she did not have the capacity to perform sedentary work in the open labor market, either on a part time or full time basis, as result of her chronic pain, active pain movement of her right arm and shoulder, and the effects of her medication. [Footnote in original: "He noted that the narcotics effect (sic) her capacity to reason, think, sequence, and make judgments."]

Dr. Green noted that he reviewed the labor market survey that was done at the request of the insurer. He did not agree that the employee could work in the area of utilization review or as a telephonic case manager, as she would not be able to concentrate and pay attention to the tasks that would be required.

(Dec. 15-16.)

The judge adopted the opinion of Dr. Green “that the aforementioned physical limitations, as well as the employee’s chronic pain, and the effect of her medication, preclude employment in the open labor market on a sustained and consistent basis.” (Dec. 17-19.)

The self-insurer argues the opinion of Dr. Green was inadmissible, and that the judge erred in relying on it. The self-insurer claims Dr. Green strayed beyond his area of expertise by considering the deleterious effect the employee’s pain medication had on her work capacity. We acknowledge the medical report of the impartial physician, upon which Dr. Green partially relied, does not address the issue of medication. However, we deem the issue waived, as there was no objection to Dr. Green’s testimony on this point. Commonwealth v. Foster, 411 Mass. 762, 768 (1992); Freyermuth v. Lutfy, 376 Mass. 612, 616 (1978); Boyle v. Columbian Fire Proofing Co., 182 Mass. 93, 98-99 (1902). The self-insurer’s failure to object also deprived the employee of her opportunity to cure the opinion’s alleged defect.¹ See Commonwealth v. Roth, 437 Mass. 777, 795-796 (2002)(technical defects raised in objection at trial “are readily cured”); Commonwealth v. Fowler, 431 Mass. 30, 36 (2000). Judging from the deposition testimony of the impartial physician, and the employee’s expert physician, Dr. Perlmutter, this certainly would have been possible. (Impartial Dep. 19; Perlmutter Dep. 29-30.)

We also note the judge credited the employee’s testimony, offered without objection, regarding the effects of medication taken for her industrial conditions. (Dec. 10; Tr. I, 22, 30, 62.) Moreover, Dr. Green was present for the employee’s entire testimony; he certainly was entitled to utilize it to further support his conclusions. (Tr. I, 99.)

¹ It also deprived the judge of the same opportunity, if she desired to inquire. See G. L. c. 152, § 11.

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Our review of the judge's decision reveals that she carefully considered the evidence, made extensive findings based on the record, and more than adequately explained her rationale in support of the § 34A benefit award.

The decision is affirmed. Pursuant to § 13A(6), employee's counsel is awarded a fee of \$1,357.64.

So ordered.

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: October 17, 2005